80-1311

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. _____

RICHARD JEFF SHELNUT, JOSEPH WALLY HANIFIN, MICHAEL CONKLIN, and SAMUEL HAZELRIG,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Richard Jeff Shelnut, Joseph Wally Hanifin, Michael Conklin and Samuel Hazelrig, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on November 5, 1980.

QUESTIONS PRESENTED

I.

Whether the initial detention and seizure of the vessel "Pappy" was conducted in violation of the Fourth Amendment of the Constitution of the United States:

II

A) In light of the general principles of law set forth in *Almeida-Sanchez v. United States,* 413 U.S. 266, 91 S.Ct. 2535, 37 L.Ed.2d 596 (1973) and *Delaware v. Prouse,* 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

B) In light of the fact the United States Coast Guard crew admitted that the boarding for a "Safety Inspection" was merely a guise to search the vessel for contraband.

C) In light of the fact that custom agents were members of the boarding party in violation of 14 USC § 141(b) and 19 CFR § 162.3.

II.

Whether the general principle of *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), governing the application of the Fourth Amendment to Administrative Searches would require the Coast Guard to obtain a warrant for an administrative safety inspection, once they were denied the right to board and search a vessel on the high seas.

III.

Whether there was sufficient evidence to convict the Defendants/Petitioners:

A) Of conspiracy in general;

B) Of conspiracy to import marijuana;

C) Of conspiracy to possess with intent to distribute marijuana.

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OPINION BELOW

The opinion of the Court of Appeals has not been reported and it is appended hereto in its slip opinion form as Appendix A.

JURISDICTION

The Judgment of the Court of Appeals was entered on the 28th day of August, 1980. Rehearing was denied by the Court on November 5, 1980. The Court of

Appeals recalled the Mandate and granted a Stay of Mandate up to and including February 3, 1981.

Appellants' Writ of Certiorari is not within the sixty (60) days required by Rule 20.1 but is within ninety '90) days. No thirty-day extension of time is necessary due to the fact this case is a criminal proceeding.

Jurisdiction to issue the Writ is invoked pursuant to the provision of Title 28, Section 1254(1), United States Code.

CONSTITUTIONAL STATUTES AND PROVISIONS INVOLVED

Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States.

14 USC 89(a)
14 USC 141(b)
19 CFR § 162.3

STATEMENT OF THE CASE

Appellants, Richard Jeff Shelnut, Joseph Wally Hanifin, Michael Conklin, Samuel Hazelrig, along with Julian Fitzgerald were indicted by Federal Grand Jury in the Southern District of Texas, Galveston Division, of conspiracy to import into the United States, marijuana, a controlled substance, in violation of Section 952(a) of Title 21, United States Code; possession of a firearm during the commission of a felony offense, in violation of Title 21, United States Code, Section 924(c)(2) and Title 18, United States Code, Section 2.

On or about the 24th day of August, 1978, all of the Defendants announced ready for trial and the Court, the

Honorable Finis Cowan presiding, began hearings on the Motion to Suppress Evidence filed in this cause, which Motion was denied by the Court.

On the 28th day of August, 1978, Defendant Julian Fitzgerald was severed from the case and a trial by jury as to all other Defendants commenced. On the 29th day of August, 1978, after one-half day of testimony, the four Defendants plead guilty to Count 1 of the Indictment, reserving the right to appeal their Motion to Suppress, and with the understanding that their exposure would be limited to a maximum of three years confinement.

On the 11th day of October, 1978, the Honorable Judge Finis Cowan allowed all four Defendants to withdraw their guilty pleas, based on the fact that same was not valid, while reserving the right to appeal the Motion to Suppress.

On the 11th day of December, 1978, Defendants Richard Jeff Shelnut, Joseph Wally Hanifin, Michael Conklin and Samuel Hazelrig, were tried together before the Honorable Finis E. Cowan, a jury having been waived.

The Government's Case

Commander Crosby, Commander of the United States Coast Guard Cutter Durable testified that on the 4th day of May, after having boarded a Japanese vessel for the purpose of observing their fishery operation, observed through radar that there was another vessel to the south of where he presently was. Commander Crosby approached said vessel in order to obtain visual contact. Commander Crosby testified that said vessel was heading in a northwesterly direction at approximately 8 knots.

The vessel in question was a standard boat, shrimp type vessel. Said vessel did not have its shrimp nets out and was not flying a flag, although the bow indicated it was sailing out of Galveston, Texas. The name of the vessel was painted on removable boards at the stern of the boat and it appeared to be the name of Pappy. At this time Commander Crosby testified that he had the vessel Pappy boarded by a boarding party led by Lieutenant Moon of the United States Coast Guard in order, among other reasons, to check that said vessel was in compliance with United States law. Commander Crosby did admit that the possibility of marijuana being on board the Pappy was discussed and that that was the reason for them conducting the safety inspection. They had no previous information that there was marijuana on the boat but rather it was the conjectures of the customs officers and the Coast Guard personnel present.

Lieutenant James W. Moon, who was in charge of the boarding party which boarded the Pappy, testified that his presence aboard the boat and the search of the boat was done under the protest of the master of the boat. Lieutenant Moon admitted that he had boarded the boat Pappy in order to check for contraband and that he had noticed that the boat was low in the water which lead to his interest in checking the cargo of the boat. He stated that he smelled no odor of marijuana until after the marijuana was found aboard the vessel. Customs Officer Canant affirmed he and the other officer, Mr. Beard, thought that the vessel appeared to be low in the water. And that the possibility of the boat carrying marijuana was considered by the parties prior to boarding and that that was one of the factors for the custom officers recommending to the Captain to board the ship. Mr.

Canant testified that Lieutenant Moon directed him, Mr. Lopez, and Mr. Shelnut, one of the Appellants, to open the rear hatch. This was for the purpose of ascertaining the main beam number. Customs Officer Canant testified that he, with some assistance from Mr. Shelnut, opened the rear hatch and discovered bales wrapped in black plastic which he thought, in all possibility contained marijuana.

There were no statements by any of the Appellants pertaining to the marijuana.

Lieutenant Moon testified to the fact that they sailed from point of seizure of the vessel Pappy for twenty hours, or 150 miles, toward the port of New Orleans and then were told to turn to the Port of Galveston, at which time it was discovered that there was not enough fuel to go to Galveston. In fact, it was determined that the vessel "Pappy" could not have reached the coast of the United States with the tank of fuel it was carrying. The Defendants moved for acquittal on Count Three, possession of a firearm, which was granted. The Court then found the Defendants guilty of Counts One and Two of the Indictment; conspiracy to import, and conspiracy to possess with intent to distribute marijuana.

On or about the 15th day of January, 1979, all four Defendants were sentenced to three years in prison and three years special parole term on both counts, sentences to run concurrently.

The United States Court of Appeals for the Fifth Circuit affirmed the conviction as to both counts. From that Judgment this Application for Writ of Certiorari has been duly perfected.

REASONS FOR GRANTING THE WRIT

(1) The Seizure of the Vessel

(a) As to Almeida-Sanchez/Delaware v. Prouse Issue

In *Almeida-Sanchez v. United States, supra,* the Supreme Court held that since the intrusion was not at the border or its functional equivalent, probable cause was required for searches of automobiles by Roving Border Patrol Agents despite broader statutory authority.

This principle was expounded upon recently in *Delaware v. Prouse, supra,* when the Supreme Court held that stopping an automobile and detaining the driver in order to effect a documentary inspection was unreasonable under the Fourth Amendment.

Both of these cases analyzed the situations using a test balancing the national interest in the specific regulation with the intrusion upon the Fourth Amendment interest these cases involved.

The present case involves a vessel on the high seas which was randomly stopped by the Coast Guard under the guise of a safety inspection pursuant to 14 USC § 89 (a). Petitioners argued that such random stops fell under the same rationale as the automobile in *Almeida-Sanchez* and *Delaware v. Prouse* in fact Petitioners argue that those on a sailing vessel have a greater expectation of privacy than an automobile.

The Court has made exceptions to the warrant requirement by holding a diminished expectation of privacy surrounds the automobile, as explained in *U. S. v. Chadwick,* 433 U.S. 1, 53 L.Ed.2d 538, 549,

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects . . . It travels public thoroughfares where both its occupants and its contents are in plain view. *Cardwell v. Lewis,* 471 U.S. 583, 590, 41 L.Ed.2d 325, 94 S.Ct. 2464, 69 Ohio Ops.2d 69 (1964) (plurality opinion).
>
> Other factors reduce automobile privacy. All states require vehicles to be registered and operators to be licensed. States and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways. *Cady v. Dombrowski,* 441, 37 L.Ed.2d 706, 93 S.Ct. 2523. Automobiles periodically undergo official inspection, and they are often taken into police custody in the interests of public safety. *South Dakota v. Opperman,* 368, 49 L.Ed.2d 1000, 96 S.Ct. 3092.

The factors which diminish the privacy aspects of an automobile are all not present in the case of a vessel. A vessel often serves as a person's residence for extended periods of time. It does not travel public thoroughfares and its occupants and contents are not in plain view. And even if the persons engaged in boating do enjoy a diminished right to the expectation of privacy by reason of federal safety regulations, they cannot be deemed to have waived all of their Fourth Amendment rights.

Even the automobile has had protections afforded it from random detention, inspection or search.

The enforcement problem is no more serious to the Coast Guard than that encountered by Border Patrol or Customs Agents along the border of Mexico. Random stops and searches have been held to infringe the Fourth

Amendment rights. *Almeida Sanchez v. U.S., supra; U.S. v. Brignoni-Ponce,* 442 U.S. 873 (1975); *U.S. v. Ortiz,* 422 U.S. 891 (1974).

The Fifth Circuit rejected this argument without explaining their rationale, simply stating that this doctrine did not apply to vessels on the high seas.

Nonetheless, the *Almeida-Sanchez* and the *Delaware v. Prouse* doctrines have yet to be discussed by the Supreme Court in the connotation of this set of circumstances of this area of law.

The rationale upon which the automobile cases are based must be extended to protect those persons in ships. Their presence upon the high seas does not justify the watering down of the Fourth Amendment to the Constitution.

A vessel on the high seas, out of an American port, is an extension of the United States; in fact, that is what gives the Coast Guard any jurisdiction at all over them, and anywhere that the American Flag flys, the Fourth Amendment should be close by.

Thus, this case presents an important question of Constitution magnitude and far-reaching significance, considering the numerous "Safety Inspections" which have turned up Marijuana and ended up being tried and then reviewed by the Federal Courts on this very issue, time after time again.

(b) As to the Safety Inspection Guise

If indeed, the random detention of a vessel pursuant to 14 USC § 89(a) for the purpose of a safety inspection is constitutional, even if not formed upon any particular-

ized suspicions, it must be examined whether such seizures are rendered unconstitutional by the admissions of those conducting the inspections that the reason it was conducted at all was to investigate for possible marijuana.

The Fifth Circuit, in the panel opinion of *U.S. v. Warren,* 550 F.2d 219, 225 (5th Cir. 1977) stated:

> This Court is also casting doubt on the authority of the Coast Guard under this statute to stop a vessel for any reason other than safety or documentary purposes, absent a showing of probable cause.

The en banc opinion in *Warren* overturned the panel decision in *United States v. Warren,* 578 F.2d 1058 (5th Cir. 1978) but the majority still did not hold that a seizure for other than a safety inspection would be permissible and a very interesting question remains.

In 14 USC § 89(a) Congress has conferred broad powers on the Coast Guard to conduct safety and documentation inspections and as a result, these regulations should be strictly construed. To use such broad powers as a guise to investigate for other possible crimes, when probable cause is lacking, is clearly an abuse of the Statutory powers and a clear violation of the Fourth Amendment to the Constitution of the United States.

The Supreme Court needs to address this issue in order to check any further abuses of the "Safety Inspection", especially in light of the many that happen to turn up Marijuana-laden vessels. What is not called to the Court's attention is the many vessels searched in this manner, in violation of the Fourth Amendment of the Constitution, and result in no seizures made and no violation occurring.

Clearly, the Supreme Court must check this unlimited abuse of authority which results in an undetermined amount of violations of the Fourth Amendment.

(c) As to the Presence of Customs Agents

In *U.S. v. Warren,* 578 F.2d 1058, 1067 (5th Cir. 1978), this Court held that:

> The statute, 14 USC § 141(b) (1976) provides in pertinent part, "The Coast Guard, with the consent of the head of the agency concerned, may avail itself of such officers and employees . . . of any Federal agency . . . as may be helpful in the performance of its duties."

The en banc decision in *Warren* made it clear that Customs Agents were authorized to assist the Coast Guard, provided that "heads" of the agency had given required consent.

The record reflects, that upon cross-examination by defense attorney as to upon whose authority the presence of the Customs Agents was predicated, Commander Crosby testified:

> "Mr. Beard and Mr. Canant came to me and discussed their idea for making these trips."

No mention is made of authority coming from the head of either of the agencies, and no specific date for any decision can be pinpointed.

The purpose was alleged to have been to learn and observe the boarding procedures of the Coast Guard.

Petitioner's question whether, by participating in Coast Guard maneuvers, Customs Agents gain the authority to

do what they cannot Statutorily or Constitutionally do on their own.

The Supreme Court addressing this issue could halt a much abused practice among the Customs and Coast Guard personnel which infringes on the privacy of many citizens and non-citizens alike, guaranteed to them by the Fourth Amendment of the Constitution of the United States.

(2) As to Marshall v. Barlow's, Inc.

Whether or not the seizure of the vessel comports with Constitutional standards, the search of the vessel represents a question as yet addressed by any court.

The general principle governing the application of the Fourth Amendment to administrative searches were recently discussed in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978). In that decision, the Court held that a warrantless intrusion on private property to investigate compliance with statutory safety requirements to be prohibited.

The main purpose of the Fourth Amendment is to safeguard the privacy of individuals from arbitrary intrusion by government officials; *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528, 18 L.Ed.2d 930; *See v. City of Seattle*, 387 U.S. 541, 18 L.Ed.2d 943.

> The Fourth Amendment's command grew in large measure out of the colonists' experience with the writ of assistance . . . that granted sweeping power to *customs officials and other agents* of the king to search at large for smuggled goods (emphasis added). *Barlow, supra at* 311, citing *U.S. v. Chadwick, supra* at 546.

In the instant case, the master of the vessel denied the boarding party permission to search the boat. The issue is whether the entry over the master's objection required the boarding party to procure a warrant.

There would be no additional burden in detaining the boat until its activities could be reported and a teletyped warrant obtained. There would be no additional burden in requiring either operators of vessels or their crew to be licensed or to appear for periodic safety inspections.

The Fifth Circuit takes the position that searches and seizures on the high seas are inherently different, but does not explain why the Warrant Clause of the Fourth Amendment does not protect vessels on the high seas and "to hold otherwise would belie the origin of that Amendment, and the American colonial experience." *Marshall v. Barlow's, Inc., supra,* at 436 U.S., 311.

The Supreme Court should grant a Writ of Certiorari to consider "Safety and Documentation Inspections" in the context of searches of vessels on the high seas.

(3) As to the Sufficiency of Evidence

The conviction of the Defendants/Petitioners is totally void of evidence in support thereof and thus, is a violation of the Fifth Amendment of the Constitution of the United States and of the due process clause of the Fourteenth Amendment to the Constitution, *Garner v. Louisiana,* 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961), *Thompson v. Louisville,* 362 U.S. 199, 80 S.Ct., 624, 4 L.Ed.2d 654.

The Supreme Court has determined the due process question to be substantial, *Thompson, supra,* 362 U.S. 199, 203.

(a) Conspiracy

The evidence failed to establish the existence of any conspiracy, and further failed to connect any of the Appellants to any alleged conspiracy.

Cases from the Fifth Circuit have clearly held that, in order to support a conspiracy conviction, the Government's evidence must first establish that a conspiracy existed, that the Appellant was a knowing and willing member of it. *James v. U.S.*, 576 F.2d 1121 (5th Cir. 1978), *U.S. v. Apollo*, 476 F.2d 156 (5th Cir. 1973).

From the facts presented here, it cannot be determined that a conspiracy existed.

The Court would have to infer that these Appellants, either all or several, were members of the conspiracy. There was no evidence that any of the Appellants knew of the marijuana, or voluntarily intended to be a part of the conspiracy. The Government has not met the burden of presenting "slight evidence," "individual and personal" in nature that shows beyond a reasonable doubt that Appellants had the "deliberate, knowing and specific intent to join the conspiracy." *U.S. v. Falcone*, 311 U.S. 205, 210-11, 85 L.Ed. 128 (1940); *U.S. v. Gutterrez, supra*, at 1281.

The four Appellants on the boat would be analogous to four men in a car in which trunk narcotics were found. Possession, much less conspiracy, cannot be inferred from that set of facts.

> At best, the evidence establishes only that he was present in the area and had fled from federal officers. It does not show that he actually participated in the unloading operation, or began his flight from near

> the truck. Further, there was no testimony by the government agents that Lopez-Ortiz had approached and entered the house prior to the raid. Indeed, all the arresting officers could say was that they found him behind a nearby rock wall.

U.S. v. Lopez-Ortiz, supra at 115. See *U.S. v. Williams,* 361 F.2d 280 (5th Cir. 1966). See *U.S. v. Littrell, supra,* in which the Defendant drove a car from which some cocaine came, and this Court held that that alone was insufficient to show he had knowledge of the existence of the drugs.

The Fifth Circuit rejected this argument stating that it was fair to conclude the crew members knew of the presence of Marijuana in the hold of the vessel when the fact remains that an experienced Coast Guard officer and Customs Officer could not detect Marijuana, either visibly or by odor upon boarding the vessel.

(b) Conspiracy to Import Marijuana

The Court would have to infer the fact that the Appellants were going to import the marijuana to the U.S., which is a plausible inference, but so would be the inference that the Appellants were to meet the Japanese freighter and import the marijuana to Japan.

The Court of Appeals in the Fifth Circuit rejected these arguments citing cases which only bolster the Defendants'/Petitioners' position that a conspiracy must first be established; *U.S. v. Teal,* 582 F.2d 343, 345 (5th Cir. 1978).

There is no iota of evidence that a conspiracy to import existed, especially under the circumstances when the

boat did not contain enough fuel to reach the coast of the United States and other vessels were in the area.

(c) The Conspiracy to Possess with Intent to Distribute

There is no evidence of any sort that there was an agreement among these Appellants, or any of the Appellants and another person, as to distribution of the marijuana.

Mere association with lawbreakers or presence at the scene of a crime is not sufficient. *U.S. v. Littrell,* 574 F.2d 828, 832 (5th Cir. 1978); *U.S. v. Gutterrez,* 559 F.2d 1278 (5th Cir. 1977); *U.S. v. Duckett,* 550 F.2d 1027 (5th Cir. 1977). In the instant case, the Government has the further duty to prove not only the agreement to violate the laws of the United States but also to show that the conspiracy to import was directed at the United States. *U.S. v. Conroy,* 589 F.2d 1258, 1270 (5th Cir. 1979); *Ingram v. U.S.,* 360 U.S. 672, 677-78, 3 L.Ed.2d 1503 (1959).

The evidence presented in Court was as follows:

1. The Appellants were present on a shrimp boat in the Gulf of Mexico in which was found marijuana in the holds below the deck.

2. From the position of the boat and with the fuel remaining, it was physically impossible for the boat to reach the United States, although headed in a northwesterly direction.

3. There were other boats in the area; specifically a Japanese fishing vessel.

There was no proof of an agreement between the Appellants and any co-conspirators, or among themselves. See *U.S. v. Lopez-Ortiz,* 492 F.2d 109, 115 (5th Cir. 1974).

In a criminal case, the Government must prove every element of the offense beyond a reasonable doubt. *Holland v. U.S.,* 348 U.S. 121, 140, 99 L.Ed. 150 (1954); *U.S. v. Salinas-Salinas, supra* at 473; *Hall v. U.S.,* 286 F.2d 676, 679 (5th Cir. 1960).

If the Court chooses to infer that such a conspiracy existed, or might have existed, the record is still void of any evidence that the Appellants participated in such a conspiracy. None of the Appellants' participation can be inferred merely from their association with the other Appellants. *U.S. v. Odom,* 526 F.2d 339, 343 (5th Cir. 1976).

The evidence could easily indicate that one or more of the Appellants were merely hired for the boat ride and had no participation or knowledge of any distribution plan.

> Although a conspiracy to import facilitates a conspiracy to distribute, one cannot join a conspiracy, whether by conduct or verbal accord, unless one knows that it has in fact been concocted. *U.S. v. Cadena,* 484 F.2d 1252, 1266 (5th Cir. 1978); *U.S. v. Rodriquez,* 585 F.2d 1234 (5th Cir. 1978).

In *Cadena* at 1265-1266, this Court held that even though it could find that a person participated knowingly in a conspiracy to import, that there must be further evidence that some sort of "accord, tacitly or other" as to the distribution must have taken place.

No evidence of this sort exists in the instant case. The Supreme Court has approved inferences from facts and circumstances of a case. *Iannelli v. United States,* 420 U.S. 770, 778, 95 S.Ct. 1284, 43 L.Ed.2d 616, 623. But there necessitates a standard on how far these inferences may go to support a conviction and it is important for the Supreme Court to speak on this issue and thus, a Writ of Certiorari should be granted to consider these issues.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

PHILIP S. GREENE

DONNA CLAIRE PENDERGAST

CERTIFICATE OF SERVICE

I do hereby certify that three copies of the foregoing Petition for Writ of Certiorari has on this the _____ day of February, 1981, been served on the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing the document in a United States Post Office mailbox with first class postage prepaid, and addressed to same as above indicated.

PHILIP S. GREENE
Attorney for Petitioners

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Richard Jeff SHELNUT, Joseph Wally Hanifin,
Michael Conklin and Samuel Hazelrig,
Defendants-Appellants.

No. 79-5101

Summary Calendar.*

UNITED STATES COURT OF APPEALS
Fifth Circuit

Aug. 28, 1980.

The United States District Court for the Southern District of Texas, Finis E. Cowan, J., convicted defendants of conspiracy to import marijuana into the United States and of conspiracy to possess marijuana with intent to distribute, and defendants appealed. The Court of Appeals, Henderson, Circuit Judge, held that: (1) evidence supported trial court's conclusion that boarding of vessel was part of document and safety check and was justified by circumstances under which it was made; (2) discovery and seizure of marijuana by Coast Guard crewmen were proper; (3) mere presence of customs agents did not change character of search or render it invalid; (4) evidence was sufficient to sustain conspiracy conviction; and (5) possession of 15 tons of marijuana

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* Fed. R. App. P. 34(a); 5th Cir. R. 18.

was in itself sufficient to support finding that defendants intended to distribute marijuana.

Affirmed.

Appeal from the United States District Court for the Southern District of Texas.

Before GEE, HENDERSON and HATCHETT, Circuit Judges.

HENDERSON, Circuit Judge:

The appellants were convicted of conspiracy to import marijuana into the United States and conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C.A. §§ 846 and 963; *see* 21 U.S.C.A. §§ 841(a)(1) and 952(a) (related substantive offenses). The appellants enumerate five errors that boil down to the legality of the search of the shrimping vessel PAPPY and the existence of requisite intent of the defendants to commit the charged offenses.

The Coast Guard cutter DURABLE, while inspecting Japanese tuna boats in international waters 180 miles south of the mouth of Mississippi River on the afternoon of May 4, 1979, observed a vessel on radar. The vessel, bearing the name PAPPY on a detachable board on its hull, came into sight at 7:00 p.m. It was not flying a flag and was headed toward Texas. The PAPPY did not appear to carry any shrimping equipment and was outside shrimping waters. The commander of the DURABLE ordered his crew to board the vessel.

At a suppression hearing, the trial court determined that the decision to board the boat was "motivated by

[a] good faith effort to make a safety and documentation inspection." In arriving at this conclusion the district judge noted that the detachable nameplate violated Coast Guard regulations, that the name of the boat was not properly filed with the Coast Guard, and that it was Coast Guard policy to inspect vessel identification numbers on American vessels whenever possible.

Lieutenant James Moon, an inexperienced officer, led the boarding party. After going aboard he apparently[1] asked the man who identified himself as the master to state the location of the vessel identification number. This request was refused, so Coast Guard seamen proceeded with a search of the boat.

The search party checked for the identification number in the aft hold before going to the main hold, where the number is often displayed. Upon entering the aft hold, at least some of them smelled marijuana and observed bales, which, upon minimal inspection, turned out to be marijuana. The appellants suggest that beginning the search for the identification number in the aft portion of the ship shows that the proffered justification for the search was a pretext. The district court rejected this assertion, noting that there is no standard location for the vessel identification number except that it is always below deck. In any case, the court found, Lieutenant Moon began to search in the aft section because of his inexperience, not because of an "improper motive to look for marijuana."

[1-3] The appellants seem to admit that the boarding and search satisfied the requirements formulated by this

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1. It is not clear that the lieutenant in fact asked this question. The district judge, at the suppression hearing, found that he did.

court and applicable statutes, but maintain that those authorities must fall under the weight of the fourth amendment. This contention is without merit. The trial court held that the boarding of the PAPPY was part of a document and safety check, justified by the circumstances under which it was made. The evidence supports this conclusion. A United States vessel in international waters may be boarded for the purpose of conducting such an inspection without any particularized suspicion of a violation of the law, *United States v. Warren,* 578 F.2d 1058, 1064-65 (5th Cir. 1978) (en banc); *but see United States v. Piner,* 608 F.2d 358 (9th Cir. 1979), so certainly this boarding, made with probable cause to believe registration infractions had occurred, was permissible. The constitutionality of inspections made under authority of 14 U.S.C.A. § 89(a) is dealt with in *Warren;* for further discussion see *United States v. Erwin,* 602 F.2d 1183, 1184 (5th Cir. 1979), *cert. denied,* ____ U.S.____, 100 S.Ct. 1014, 62 L.Ed.2d 752 (1980); *United States v. Whitaker,* 592 F.2d 826, 828-30 (5th Cir.), *cert. denied,* 444 U.S. 950, 100 S.Ct. 422, 62 L.Ed.2d 320 (1979); *United States v. Conroy,* 589 F.2d 1258, 1264-69 (5th Cir.), *cert. denied,* 444 U.S. 831, 100 S.Ct. 60, 62 L.Ed.2d 40 (1979); *United States v. Cadena,* 585 F.2d 1252 (5th Cir. 1978); *United States v. One 43 Foot Sailing Vessel,* 538 F.2d 694 (5th Cir. 1976); *United States v. Odom,* 526 F.2d 339, 342 (5th Cir. 1976); *cf. United States v. Freeman,* 579 F.2d 942, 944-47 (5th Cir. 1978) (customs search). Once the Coast Guard crewmen were aboard the PAPPY, the strong odor of marijuana, the fact that it was in plain sight, and the argumentative manner of the person identified as the ship's master all indicate that the discovery

and seizure were proper, and therefore the marijuana was admissible. *United States v. Delgado,* 615 F.2d 294, 296 (5th Cir. 1980); *United States v. Erwin,* 602 F.2d at 1184; *United States v. Whitaker,* 592 F.2d at 829; *United States v. Conroy,* 589 F.2d at 1265; *United States v. Warren,* 578 F.2d at 1065; *United States v. Odom,* 526 F.2d at 342. Similarly, appellants' contention that the Coast Guard was obligated to obtain a warrant before making its safety and documentation check has, as they admit, been rejected by this court. *United States v. Warren; cf. United States v. Conroy,* 589 F.2d at 1268 (discussing *Warren*); *United States v. Freeman,* 579 F.2d at 945 (customs search).

The fourth amendment to our Constitution, which protects from unreasonable government-sponsored intrusion, is one of the most cherished safeguards in the Bill of Rights. Two recent and much-publicized Supreme Court decisions serve as a reminder of the broad scope of the protection afforded by the amendment. In *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), the Court held that a warrantless administrative search violated the amendment. In *Delaware v. Prouse,* 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), random stops of automobiles were ruled unconstitutional when made without any guidelines or suspicion of criminal activity.

[4] We do not interpret these cases to mean that the search of the PAPPY was unconstitutional. We have recently reaffirmed our long-standing position that seizures and searches on the high seas are fundamentally different from those on land. *United States v. Williams,* 617 F.2d 1063 (5th Cir. 1980) (en banc). The appellants are

content to cite *Prouse* and *Barlow's* in passing. We need not construct any argument around them where the appellants have failed to do so. It will suffice to say that in both cases the Court was careful not to spread its net too wide, and nothing in the opinions suggests that the Constitution forbids Coast Guard inspections of American vessels on the high seas conducted in pursuance of a policy of stopping as many vessels as possible, let alone those justified by visible violations of the regulatory statutes.

[5] United States Customs agents were aboard the DURABLE when the PAPPY was first sighted, and they went along on the search. The finding of the trial court that they accompanied the Coast Guard personnel in the capacity of observers, and only for that reason, is supported by the record. Moreover, contrary to the interpretation the appellants would have us make the en banc decision of this court in *Warren,* 578 F.2d at 1066-67, demonstrates that in this case the participation of the Customs agents "in the boarding, interrogation, arrests, and seizures . . . does not invalidate those actions." *Id.* at 1067. The search was made by the Coast Guard, and the mere presence of Customs agents did not change its character. *Id.; cf. United States v. Bates,* 526 F.2d 966 (5th Cir. 1976).

The appellants also urge that there was insufficient evidence to show that they were members of a conspiracy; that it was the aim of the conspiracy to bring the marijuana into the United States (as opposed to transferring it to vessels going abroad); or that they intended to distribute the marijuana.

[6] The PAPPY was loaded with almost fifteen tons of marijuana. Small amounts of marijuana and hashish were found in the galley. These circumstances support the inference that there existed an agreement to achieve an illegal purpose—the importation of marijuana. *Pinnelli v. United States,* 420 U.S. 770, 777 n.10, 95 S.Ct. 1284, 1289 n.10, 43 L.Ed.2d 616, 623 (1975); *United States v. Bankston,* 603 F.2d 528, 532 (5th Cir. 1979). The defendants were arrested on a boat literally packed full of contraband, and it was fair to conclude that the crewmembers knew of the conspiracy and participated in the illegal enterprise. *United States v. Whitmire,* 595 F.2d 1303, 1316-17 (5th Cir. 1979); *United States v. Conroy,* 589 F.2d at 1265; *United States v. Teal,* 582 F.2d 343, 345 (5th Cir. 1978); *United States v. Christian,* 505 F.2d 94, 96 (5th Cir. 1974).

[7] The vessel was headed for Galveston, Texas. The appellants claim the PAPPY did not have sufficient fuel to reach the United States, but the transcript does not support this assertion, and even if there had not been enough fuel the court[2] could have found that the conspirators had miscalculated their fuel supply. The evidence supports the conclusion that the PAPPY was bound for home. *United States v. Conroy,* 589 F.2d at 1269-71. Finally, the possession of such a large amount of marijuana is itself sufficient to support the finding that the appellants intended to distribute it. *United States v. Love,* 599 F.2d 107, 109 (5th Cir.), *cert. denied,* 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 312 (1979).

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2. Trial before a jury was terminated when the defendants changed their pleas to guilty, suject to their reservation of certain suppression motions. The court rejected the conditional pleas and the trial resumed, but the appellants waived trial by jury.

The search of the PAPPY was constitutional, and the government proved all elements of the conspiracy. The convictions are

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term, 19

No. 79-5101

Summary Calendar

D. C. Docket No. CR-G-78-6

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD JEFF SHELNUT, JOSEPH WALLY HANIFIN, MICHAEL CONKLIN and SAMUEL HAZELRIG,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

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Before GEE, HENDERSON and HATCHETT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the

Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the convictions of the said District Court in this cause be, and the same is hereby, affirmed.

August 28, 1980

Issued as Mandate: Nov. 14, 1980

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

NO. 79-5101

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
RICHARD JEFF SHELNUT, JOSEPH WALLY HANIFIN, MICHAEL CONKLIN and SAMUEL HAZELRIG,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING
(November 5, 1980)

Before GEE, HENDERSON and HATCHETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ ROBERT S. HENDERSON
United States Circuit Judge

APPENDIX D

CONSTITUTIONAL PROVISIONS

Amendment [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment [XIV.]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

14 U.S.C. § 141. General . . .

> (b) The Coast Guard, with the consent of the head of the agency concerned, may avail itself of such officers and employees, advice, information, and facilities of any Federal agency, State, Territory, possession, or political subdivision thereof, or the District of Columbia as may be helpful in the performance of its duties. In connection with the utilization of personal services of employees of state or local governments, the Coast Guard may make payments for necessary traveling and per diem expenses as prescribed for Federal employees by the standardized Government travel regulations. Aug. 1949, c. 393, § 1, 63 Stat. 505.

§ 89. Law enforcement

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel

compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaped to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

(b) The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing any law of the United States shall:

(1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and

(2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

(c) The provisions of this section are in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers, or any other officers of the United States. Aug. 4, 1949, c. 393, § 1, 63 Stat. 502; Aug. 3, 1950, c. 536, § 1, 64 Stat. 406.

FEDERAL REGULATIONS

19 C.F.R. § 162.3 (1977).

(a) *General authority*. A Customs officer, for the purpose of examining the manifest and other documents and papers and examining, inspecting and searching the vessel, may at any time go on board:

* * *

(2) Any American vessel on the high seas, when there is probable cause to believe that such vessel is violating or has violated the laws of the United States.